

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FOUR**

**200 STATE STREET, LLC, AND CORK & FORK
OSTERIA, LLC, A SINGLE EMPLOYER**

Employer

and

Case 04-RC-263237

717 RESTAURANT WORKERS UNITED

Petitioner

REQUEST FOR REVIEW

Pursuant to Section 102.67 of the National Labor Relation Board's ("Board") Rules and Regulations, 200 State Street, LLC and Cork & Fork Osteria, LLC (hereinafter the "Employer") hereby request that the Board review the Regional Director of Region 4's Decision and Direction of Election dated August 25, 2020, and in support thereof aver as follows.

I. Factual Background

Employer operates two restaurants – Cork and Fork which is located in Harrisburg, Pennsylvania, and Cork and Fork Osteria, which is located in Camp Hill, Pennsylvania. The two restaurants are approximately eight (8) miles apart. Many of Employer's employees work varied shifts at both Cork and Fork locations. On July 15, 2020, 717 Restaurant Workers United ("Union" or "Petitioner") filed a petition under Section 9 (c) of the National Labor Relations Act ("Act"), as amended, seeking to represent a group of approximately 39 employees of the Employer. A hearing was held on August 10, 2020, at which time the parties entered into an agreement which resolved all questions relating to eligibility and the composition of the voting unit. The only remaining issue to be decided was whether the election would be conducted via in-person ballot or mail ballot.

At the hearing, the Employer presented several arguments for conducting the election via in-person ballot as opposed to a mail ballot. Initially, the Employer noted the Board's historical preference for conducting in-person elections due to security issues and lower participation rates associated with mail ballots. The Employer further argued that there is significant risk that mailed ballots could be lost or delayed by the postal service or ballots will be disqualified because they are not completed correctly or returned in a timely manner. By way of example, the Employer noted that they currently employ a number of Spanish-speaking employees who may not be able to read and understand the instructions on the ballot envelopes (which are in English), which could result in those ballots being voided if they are not completed correctly. Moreover, because the Employer is in the restaurant business, the employee population typically tends to be younger (e.g., college students and young professionals) and that population may be less accustomed to receiving information by mail versus electronically – again, potentially leading to reduced participation in the election. Finally, the Employer confirmed that it was able to comply with all safety guidelines suggested by the Board's General Counsel in Memorandum 20-10 ("Memorandum") dated July 6, 2020, which addresses how to conduct manual elections safely amidst the COVID-19 pandemic.

The Petitioner argued that reduced staffing levels due to the ongoing COVID-19 pandemic could result in lower voter turnout for an in-person election because employees would be unable or unwilling to leave work during their shift to vote (due to a loss of potential tips) or may not be scheduled to work on the day of the election. Petitioner also argued that many employees work more than one job or did not have transportation to get to and from the Osteria location and, as a result, may not be available or able to participate during the proposed voting period. In response to Petitioner's arguments, the Employer indicated that it would schedule at least twenty (20) employees per shift on the day of the election to provide more coverage and give employees the

opportunity to vote. The Employer also offered to provide transportation via a third-party shuttle service to and from the Osteria location during the voting period. Any transportation services provided by the Employer would adhere to all necessary safety protocols, such as mask wearing, occupancy limits, and physical distancing, to prevent the potential transmission of COVID-19.

On August 25, 2020, the Regional Director issued a Decision and Direction of Election (“Decision”) mandating that a mail ballot was warranted to protect the employee’s right to participate in the election and for the safety of all parties involved in the election process due to COVID-19 concerns. More specifically, the Regional Director stated that while the accommodations and arrangements offered by the Employer were considered, there were several factors that weighed in favor of a mail ballot, including: 1) the necessary interaction between employees and the Board Agent during the manual election process; 2) the potential inability to maintain social distancing during the election process; 3) the potential risk of transmitting COVID-19 due to the employees’ ongoing interaction with the general public as part of their regular work; and 4) the possibility of voter disenfranchisement due to a COVID-19 diagnosis or mandatory quarantine.

Pursuant to the Decision, the mail ballots will be mailed to all employees in the proposed collective bargaining unit on September 8, 2020 and voters must return their mail ballots so that they are received by the Board by the close of business on October 6, 2020. The mail ballots will be counted on the morning of October 13, 2020 at location to be determined. The following positions will constitute the bargaining unit as agreed upon by the parties:

Included: All full-time and regular part-time bartenders, cooks, dishwashers, hosts, and servers employed by the Employer at its

Harrisburg, Pennsylvania and Camp Hill, Pennsylvania restaurants.

Excluded: All office clerical employees, General Managers, Bar Managers, managerial employees, confidential employees, professional employees, guards, and supervisors as defined in the Act, and all other employees.

The Employer filed the final voter list with the Board on August 27, 2020, which was undisputed by the Union.

II. Discussion

The Regional Director Erred in Determining that the Potential Safety Concerns Relating to COVID-19 Outweigh the Inherent Problems Associated with a Mail Ballot

The Regional Director primarily based his decision to conduct the election via mail ballots on safety concerns and perceived risks associated with COVID-19. The Regional Director further stated in the Decision that there is significant risk of voter disenfranchisement due to these safety concerns because a voter may be diagnosed with COVID-19 right before the election and be required to self-quarantine or those who have been exposed to the virus may transmit the virus to others during the voting process. While the Employer understands and agrees that the health and safety of all election participants is paramount, the Regional Director's concerns appear to be overly conservative as the potential risks relating to COVID-19 are negligible at best and can be adequately addressed with established safety protocols.

As noted previously, the Employer operates two restaurants and due to the nature of the service industry, its employees have been working and interacting with the general public for

several months with appropriate safety precautions and in accordance with safety guidelines established by the Pennsylvania Department of Health and Governor Wolf. Further, the Employer carefully reviewed all the safety protocols included in the Board's Memorandum and confirmed that it was able to meet all necessary requirements. It has a large, well-ventilated space on the second floor of its Osteria location, known as the mezzanine, that would permit adequate social distancing for all participants in the election – including the Board Agent and observers. The mezzanine also has two access staircases which would allow for one-way traffic to and from the voting area as one staircase would be used as the entrance to the mezzanine area and the second staircase would be used as the exit. The voting area would be marked with appropriate signage and floor markings to ensure all safety protocols are understood and followed. The Employer also has plexiglass partitions to protect the Board Agent, observers, and the employees during any necessary interaction throughout the voting process and would provide masks and gloves, as well as hand sanitizer, to all participants. In addition to the voting facility, the safety protocols also would apply to any transportation provided by the Employer to and from the Osteria location. All riders would be required to wear a mask, use hand sanitizer and the occupancy would be limited to allow for physical distancing.

If these procedures are followed, there is no reason to believe that a manual election could not be conducted in a manner that protects the safety and health of all participants. Indeed, businesses interact with customers and operate on a daily basis without issue by using safety guidelines similar to what were established in the Memorandum. Significantly, the Petitioner itself did not raise any objections to an in-person election based on COVID-19 related safety concerns on behalf of the employees it seeks to represent.

*The Potential Prejudice to the Employer that could Result from a Mail Ballot Significantly
Outweighs the Regional Director's Perceived "Extraordinary" Circumstances*

The Board's Casehandling Manual, Part Two, provides guidelines for determining when a mail ballot should be utilized and this was further clarified in San Diego Gas and Electric, 325 NLRB 1143 (1998). In San Diego Gas and Electric, the Board noted that the use of mail ballots has been considered appropriate in circumstances where a manual election might be possible but would be impractical or not easily done, such as when voters are "scattered" in terms of work schedule and/or geographic area or where a strike or lockout is in progress. Absent "extraordinary" circumstances, a Regional Director should use these guidelines when exercising their discretion to decide whether a mail ballot should be utilized.

Here, the usual guidelines for determining whether a mail ballot was appropriate were completely disregarded as it was decided that the existence of the COVID-19 pandemic qualified as an "extraordinary circumstance" that required the use of mail ballots versus an in-person ballot. While we agree that there are safety concerns relating to COVID-19, as discussed above, we believe the Employer has taken the necessary steps to address those concerns and keep all participants in the election process safe and healthy. As such, consideration must be given to the inherent problems of a mail ballot in this situation and the potential harm to the Employer if the parties proceed with a mail ballot.

First and foremost, the risk of potential voter disenfranchisement is much higher in a mail ballot process than in a manual election. In the instant case, the Employer has numerous Spanish-speaking employees who may not be able to read and understand the instructions on the envelope of the ballot and if they do not properly follow those instructions for completing and returning the ballot, their vote may be voided. If an employee has a question on the completion of a mail ballot,

he/she does not have any resources readily available to him/her to address those questions which greatly increases the likelihood of errors in the ballot or incomplete ballots - both of which would void the ballot. It should also be noted that many of the employees are younger professionals or college students who are used electronic communication (texting, email, etc.) as opposed to utilizing the traditional postal system. This further increases the risk that voter turnout will be significantly lower with a mail ballot because voters may overlook important information provided to them through the mail as opposed to in-person or electronic communication. Additionally, the potential for a ballot to be lost or stolen during the mail delivery process is significant and if an employee does not request a replacement ballot in a timely fashion, his/her ballot would not be counted.

Petitioner has raised concerns regarding the staffing levels at the restaurants and transportation on the day of the election may result in lower voter turnout, but those concerns have been adequately addressed by the Employer. The Employer will provide transportation to and from the Osteria location to any employee who needs it and will ensure that the transportation service offered is in accordance with COVID-19 safety protocols, which includes the use of face masks and occupancy limits to allow for proper distancing. The Employer also is willing to increase the staffing at both restaurants on the day of the election to allow all employees the opportunity to vote notwithstanding the fact that this will reduce the number of patrons that can be in the restaurant at that time due to COVID-19 occupancy limitations. Additionally, the voting period proposed by the Employer covers a four (4) hour window of time in the late afternoon/early evening time period to allow for maximum participation by the employees – including those who may work a second job.

It has been demonstrated that manual elections result in a higher voter turnout and more valid ballots. In fact, in the recent case of Western Wall Systems, LLC, 2020 NLRB LEXIS 235, the Board specifically noted that there are inherent problems with mail ballot elections, and it would be open to addressing the criteria for mail balloting in a future appropriate proceeding. In Western Wall, the election was a mixed mail and manual ballot election process, however, the majority of the mail ballot voters encountered significant difficulties with the process, including insufficient time to receive and return the completed ballot, English-only instructions on the ballot, a lack of support for questions relating to the mail ballots and delays in mailing ballots and duplicate ballots. These issues with the mail ballots ultimately denied several voters the opportunity submit valid and potentially determinative ballots in the election process. When the Board itself recognizes there are problems with mail ballot elections, the Employer's concerns about voter turnout and a fair election process should not be overlooked due to perceived "extraordinary" circumstances. If the Board is not willing to consider a manual election, it should, at a minimum, consider a mixed mail and manual ballot to ensure that voter participation reaches maximum levels during this critical process.

III. Conclusion

Considering the significant potential for low voter turnout and the potential for excluding determinative ballots, the Board is urged to grant this Request for Review and to instruct the election to be conducted by manual ballot.

WHEREFORE, 200 State Street, LLC, and Cork & Fork Osteria, LLC hereby respectfully request that the Board grant this Request for Review.

Respectfully Submitted,

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Date: September 8, 2020

Certificate of Service

The undersigned certifies that on this date, a copy of the foregoing document was served upon the following persons via electronic mail:

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Date: September 8, 2020

/s/ Schaun D. Henry
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